

LAWS1061

Torts

Complete Course Notes

UNSW Law and Justice | Negligence, Nuisance and Breach of Statutory Duty

Course Overview

Structure of the Course

LAWS1061 Torts is a core course in the UNSW Law program. It builds on the study of intentional torts from the Introduction to Law and Justice (ILJ) course. The primary focus is the tort of negligence, which is the dominant mechanism by which Australian law compensates for personal injury and property damage caused by carelessness. The course also covers private nuisance and breach of statutory duty.

The course is governed by the interaction between common law and the Civil Liability Act 2002 (NSW) ('CLA'). The CLA was introduced in 2002-2003 in response to a perceived 'insurance crisis'. It builds on, modifies and in some respects replaces the common law.

The Elements of Negligence

Every action in negligence requires the following five elements to be established sequentially. If any element fails, the action fails at that point.

Element	Key Question	Governing Law
1. Duty of Care	Does D owe P a legal duty to take care? Is P a person (or within the class of persons) to whom D owes an obligation?	Common law, supplemented by CLA Parts 1A, 3 and 5 for specific duty categories.

Element	Key Question	Governing Law
2. Breach of Duty	Did D fall below the standard of care required? Would a reasonable person in D's position have taken precautions?	CLA ss 5B and 5C (largely codify the common law). CLA ss 5O and 5P for professional standards.
3. Causation and Remoteness	Did D's breach cause P's harm? Is P's harm too remote from D's breach?	CLA s 5D (factual causation and scope of liability). Common law remoteness doctrine.
4. Defences	Does D have a defence that limits or eliminates liability?	CLA: contributory negligence (ss 5R-5S), voluntary assumption of risk (ss 5F, 5G), dangerous recreational activity (ss 5K, 5L).
5. Damages	What compensatory amount does D owe P?	CLA Part 2 (personal injury damages). Common law principles where CLA does not apply.

The Critical Threshold Question: Does the CLA Apply?

Before applying any provision of the CLA, the first question must always be whether the CLA applies to these facts. Section 3B sets out the categories of civil liability that are excluded from the Act. The most important exclusions for a first-year course are:

- Civil liability in respect of an intentional act done with intent to cause injury or death, or sexual assault: the whole Act does not apply (with limited exceptions). The common law governs entirely.
- Dust diseases claims under the Dust Diseases Tribunal Act 1989: most of the Act does not apply.
- Tobacco-related personal injury damages: most of the Act does not apply.
- Motor accident claims governed by the Motor Accidents Compensation Act 1999 or Motor Accident Injuries Act 2017: separate legislation applies (some CLA provisions apply by force of s 3B(2)).
- Workers compensation claims under the Workers Compensation Act 1987: the Act does not apply.

If the CLA does not apply by reason of s 3B, the common law of negligence governs the claim entirely. If the CLA does apply, it is the starting point, informed by the common law.

Key principle: The CLA is inherently pro-defendant. It was introduced to reduce the incidence and quantum of negligence claims. Every student must ask: does s 3B exclude the CLA on these facts? If not, which CLA provisions apply, and how do they interact with the common law?

Course Topics

Topic	Weeks	Content
Introduction to Torts and the CLA	Week 1 Class 1	Classifications of torts; the foundation of tort liability; the structure and scope of the CLA; alternatives to the fault-based approach.
Private Nuisance	Week 1 Class 2	Interference with enjoyment of land; elements; defences; remedies.

Topic	Weeks	Content
Duty of Care: General Approach	Week 2 Class 1	Three-element overview; the neighbour principle; approaches to establishing DoC; salient features.
Duty of Care: Mental Injury	Week 2 Class 2	Consequential vs pure mental harm; CLA ss 27, 32, 33, 31, 30; recognised psychiatric illness.
Duty of Care: Occupiers' Liability	Week 3 Class 1	Control over premises; liability for entrants; liability for third party acts (Modbury).
Duty of Care: Pure Economic Loss	Week 3 Class 2	Consequential vs pure economic loss; negligent misstatement (Hedley Byrne, Esanda); negligent act (Perre v Apand).
Duty of Care: Public Authorities	Week 4 Class 1	CLA ss 41, 42, 43A; statutory power vs duty; Crimmins 6-point test; Graham Barclay Oysters.
Breach: Factual Breach and Calculus	Week 4 Class 2	CLA s 5B(1) -- foreseeability, not insignificant, reasonable response; s 5B(2) calculus; Wyong v Shirt.
Breach: Standard of Care	Week 5 Class 1	Reasonable person; children (McHale); mental illness (Carrier); learner drivers (Imbree); professionals (Rogers v Whitaker, CLA s 5O, s 5P).
Causation 1: Factual Causation	Week 7 Class 1 (part)	CLA s 5D(1)(a) but-for test; Adeels Palace; material contribution exception (s 5D(2)); what P would have done (s 5D(3)).
Causation 2: Scope of Liability	Week 7 Class 1	Novus actus interveniens (Chapman v Hearse, Mahony, Chu, Haber, McKew); remoteness of harm; Wagon Mound No 1; eggshell skull rule.
Defences 1: Contributory Negligence	Week 7 Class 2	CLA ss 5R-5S; standard of care; causal connection; apportionment (Pennington, Podrebersek).
Defences 2: VAR and DRA	Week 8 Class 2	Voluntary assumption of risk; obvious risk (CLA s 5F); CLA s 5G; dangerous recreational activity (CLA ss 5K, 5L).
Concurrent Liability	Week 8 Class 2	Vicarious liability (employer/employee; course of employment); non-delegable duty of care (Burnie test).
Damages Part 1	Week 9 Class 1	Past/future loss of earnings; medical expenses; Sharman v Evans; Wynn v NSWIM; caps and discount rate.
Damages Part 2	Week 9 Class 2	Gratuitous attendant care (CLA s 15); discount rate (s 14); non-economic loss (CLA s 16); pain and suffering; loss of amenities; loss of expectation of life.
Breach of Statutory Duty	Week 10	Six elements; private right to sue; class of persons; type of harm; nominated D; breach; causation.

Week 1 -- Introduction to Torts and the Civil Liability Act

1.1 Defining Tort Law

Torts is concerned with the obligations of people who live in a crowded society to respect their neighbours' safety, property and personality. It is a body of civil law -- distinct from contract, equity and criminal law -- that identifies circumstances in which one person (the plaintiff, P) may recover a monetary remedy from another (the defendant, D) for civil wrongs.

Torts can be classified by the nature of the act or omission involved:

Actions in Trespass (Intentional Torts)	Actions on the Case (Unintentional Torts)
<ul style="list-style-type: none"> • Battery: intentional direct application of force. • Assault: intentional act causing apprehension of imminent contact. • False imprisonment: intentional total restraint of movement. • Studied in Introduction to Law and Justice (ILJ). 	<ul style="list-style-type: none"> • Negligence: the focus of this course. • Nuisance: interference with enjoyment of land. • Defamation: publication of false statements harming reputation. • Breach of statutory duty. • Conversion, deceit, malicious prosecution.

1.2 Theoretical Foundations of Tort Liability

Why should D pay compensation to P? The theoretical basis for tort liability is contested. Different theories place emphasis on different values:

Corrective Justice	Grounded in Aristotle's Nichomachean Ethics. When one person has wrongly harmed another, the moral balance is disturbed and must be corrected. Compensation restores the position of the plaintiff (brings the 'hurt one back to parity'). Ernest Weinrib is the leading contemporary proponent. Focuses on the bilateral relationship between two parties; emphasises moral rights based on free human agency.
Distributive Justice	Tort law as a mechanism for allocating risk across society. The question is whether loss should lie where it falls or be redistributed. Insurance is a parallel mechanism. Liability insurance is so central to tort law that it is rare to bring a tort action without the defendant being insured. The existence of liability insurance may reduce deterrence by insulating wrongdoers from the full financial consequences of their conduct.
Deterrence (Law and Economics)	Tort liability creates incentives to take efficient levels of care. If D knows it will be liable for harm caused, D will invest in precautions up to the point where the marginal cost of precaution equals the expected marginal cost of liability. This promotes social welfare by internalising the costs of harmful activities.
Vindication and Rights	Rights-based tort law focuses on the plaintiff's ability to get redress for violation of their rights, independent of consequences. Civil recourse theory

	emphasises that tort law vindicates the plaintiff's right to an avenue of redress against the defendant.
Feminist Theory	Feminist scholarship challenges the assumption that tort law is neutral and objective. It examines who the law protects (and fails to protect), who gets compensated (and at what rate), and how tort categories and damage assessments embed assumptions about social roles.

1.3 The Civil Liability Act 2002 (NSW)

The CLA was introduced following a period of rising insurance premiums and several high-profile cases (including *Perre v Apand* and *Annetts v Australian Stations*) that expanded tort liability. The Act is pro-defendant in its orientation.

The CLA's relationship with the common law:

- Builds on common law in many places -- the CLA presupposes understanding of common law negligence.
- Modifies common law in some places -- particularly on standard of care for professionals (s 5O), mental harm (Part 3) and public authorities (Part 5).
- Creates new law in some places -- the 'dangerous recreational activity' defence (ss 5K, 5L) has no common law equivalent.

The key question at every stage of analysis is: has the CLA modified or replaced the common law for this element of negligence? If the CLA does not apply (per s 3B), the common law governs.

1.4 Alternatives to the Fault-Based System

The dominant alternative to fault-based tort liability is the New Zealand Accident Compensation Scheme (Accident Compensation Act 2001 (NZ)):

- Provides no-fault compensation for personal injury suffered in New Zealand.
- Purpose: to minimise both the overall incidence of injury in the community and the impact of injury on the community, including economic, social and personal costs.
- A person has cover for personal injury if they suffer the injury in New Zealand and it falls within the Act's defined categories.
- Critics argue the NZ scheme reduces deterrence. Proponents argue it provides more equitable access to compensation regardless of ability to prove fault.

Other legislative schemes relevant to personal injury in NSW include the Workers Compensation Act 1987 (NSW), Motor Accidents Compensation Act 1999 (NSW), National Disability Insurance Scheme (NDIS), and National Injury Insurance Scheme (NIIS).

Week 2 -- Duty of Care: General Approach

2.1 Overview of the Negligence Action

The tort of negligence is the common law tool for deciding when and under what circumstances to shift a loss from the person who suffers the loss (the plaintiff) to the person who caused it (the defendant). It does so by imposing liability on a defendant who, when placed in circumstances where there is a reasonably foreseeable and not insignificant risk of harm to another person, unjustifiably fails to take reasonable care -- either to avoid causing that harm or, in some circumstances, to prevent that harm from occurring -- provided it is appropriate to impose a legal duty to take such care on the defendant (Davis, *Connecting with Tort Law*, OUP, 2nd ed, 2020).

2.2 Purpose of the Duty of Care

The duty of care serves two related functions:

- It is the legal threshold to an action in negligence: it determines whether P can proceed at all.
- It defines and limits the people between whom and the circumstances in which the law will impose liability. Without a limiting mechanism, negligence liability could expand without principled bounds.

2.3 The Historical Development of the Duty of Care

Heaven v Pender (1883): Early Privity Focus

In the 19th century, negligence liability required privity -- a contractual relationship between D and P. In *Heaven v Pender*, D supplied an unsafe scaffold to a ship owner who contracted with Gray. Heaven, an employee of Gray who used the scaffold, could not directly sue D because there was no contractual relationship between them.

Donoghue v Stevenson [1932] AC 562: The Neighbour Principle

Lord Atkin's neighbour principle in *Donoghue v Stevenson* (the 'snail in a bottle' case) is the foundation of modern negligence law. The question is: who in law is my neighbour? The answer is: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.

- This created a general, open-ended duty of care based on reasonable foreseeability and proximity.
- The narrow ratio established a duty of care between the manufacturer of a product and the ultimate consumer.
- The neighbour principle provided the broader foundation for all subsequent duty of care development.

2.4 The Unforeseeable Plaintiff

A preliminary question is whether P (or the class of persons to which P belongs) was reasonably foreseeable. The unforeseeable plaintiff cannot establish a duty of care.